

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of CHARLES CROMWELL,
KELSEA CLARK, SAHWO CLARK, XAVIER
ALDRIDGE, ROBERT HAYES, G. HAYES, and
LOTTI HAYES, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

ARTICIA CLARK,

Respondent-Appellant,

and

ROBERT HAYES,

Respondent.

UNPUBLISHED

August 19, 2003

No. 242751

Wayne Circuit Court

Family Division

LC No. 93-311640

Before: Donofrio, P.J., and Bandstra and O'Connell, JJ.

PER CURIAM.

Respondent-appellant appeals as of right from the trial court's order asserting jurisdiction over the minor children under MCL 712A.2(b)(1) and (2). Respondent-appellant alleges as error several aspects of the adjudication trial, at which she represented herself, and additionally asserts that the jury's decision that the children came within the purview of MCL 712A.2(b) was not supported by a preponderance of the evidence. We affirm.

Respondent-appellant first asserts that the trial court did not make sufficient inquiry into her request for self representation, thus rendering her waiver of the right to counsel defective. Principles surrounding the right to effective assistance of counsel have been developed in the context of criminal law, but apply by analogy to child protective proceedings. *In re CR*, 250 Mich App 185; 646 NW2d 506 (2001). The right to self representation is guaranteed by the Sixth Amendment, the Michigan Constitution, and Michigan statute. *Faretta v California*, 422

US 806; 95 S Ct 2525; 45 L Ed 2d 562 (1975); *People v Dennany*, 445 Mich 412, 426-427; 519 NW2d 128 (1994).

Before granting the request for self representation, the trial court must ascertain: (1) whether the request is unequivocal, (2) that the right is asserted knowingly, intelligently and voluntarily, and (3) that self representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business. *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976). In this case, the trial court did not conduct a thorough inquiry into whether respondent-appellant, who had mental health issues including paranoia, was asserting her right knowingly, intelligently, and voluntarily. In addition, respondent-appellant asserted her right to self representation only after being informed by counsel that the trial court would most likely appoint standby counsel. Pursuant to *Dennany*, *supra* at 446, a request for standby counsel, whether for matters procedural or substantive, can never be considered an unequivocal request for self representation.

However, the trial court's failure to make sufficient inquiry into respondent-appellant's waiver of counsel was harmless error, particularly in light of the presence of standby counsel. In the case of unpreserved constitutional error, "[t]he defendant must show a plain error that affected substantial rights," requiring reversal "only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Carines*, 460 Mich 750, 774; 596 NW2d 130 (1999). Respondent-appellant was represented by counsel before trial and had the benefit of counsel's expertise at pretrial evidentiary motions. Thus, petitioner was not able to introduce inadmissible evidence. Respondent-appellant consulted with her standby counsel during the trial. Respondent-appellant, because of her inexperience, introduced self-serving evidence that would never have been heard by the jury had counsel represented her, and the evidence supporting a finding of jurisdiction was so ample that the jury would have reached that conclusion even if respondent-appellant had been represented by counsel. Consequently, reversal is not required on this ground.

Secondly, respondent-appellant asserts that the trial court engaged in a biased, condescending, and demeaning barrage of commentary toward her, thus prejudicing the jury against her and denying her a fair trial. The test for whether a new trial should be ordered is whether the judge's partiality may quite possibly have influenced the jury to the detriment of a party's case. *People v Davis*, 216 Mich App 47, 50-51; 549 NW2d 1 (1996).

The trial judge's constant reminders to respondent-appellant to keep her questions relevant and to avoid giving testimony under the guise of cross-examination were not condescending, biased, or demeaning, but necessary for a properly conducted trial, even though the trial court exhibited exasperation at some points. However, the trial court's comment in front of the jury regarding the psychological symptoms respondent-appellant had apparently exhibited were improper, particularly in light of the fact that her mental illness was one of petitioner's grounds for requesting jurisdiction over the children.

The trial court's comment constituted a breach of its mantle of impartiality, and, reviewing this issue for unpreserved nonconstitutional error, this Court must determine whether plain error affecting substantial rights occurred. *Carines*, *supra* at 774. The trial court's reference to respondent-appellant's mental illness was harmless error because the jury had already been presented with irrefutable evidence of respondent's mental illness through

testimony and admission of documentary evidence. Respondent-appellant disputed that she was mentally ill, but admitted to needing, but failing to take, medication. She did not dispute attempting to place a “hex” on a foster care worker, and did not try to explain or rationalize her behavior, but treated it as normal. The trial judge’s one short comment could not have influenced the jury to the detriment of respondent-appellant’s case given the plethora of evidence establishing her mental illness. Reversal is not required on this ground either.

Thirdly, respondent-appellant contends that the trial court’s revised jury instruction was so prejudicial that it deprived her of a fair trial. Claims of instructional error are reviewed by this Court de novo. *Hilgendorf v St John Hosp & Medical Ctr Corp*, 245 Mich App 670, 694; 630 NW2d 356 (2001). Respondent-appellant did not raise this issue in the trial court, but instead agreed with the revised jury instructions after consultation with standby counsel. Therefore, this issue is not preserved for review. *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997). To prevail on an unpreserved issue on appeal, respondent-appellant must show that clear error occurred affecting her substantial rights, i.e., affecting the outcome of her case. *People v Grant*, 445 Mich 535, 552-553; 520 NW2d 123 (1994). The jury instructions were not legally incorrect, nor did they prejudice respondent-appellant in any way. There was no error, and no impact on the outcome of respondent-appellant’s case. Thus, reversal is not required on this ground.

Finally, respondent argues that there was not sufficient evidence that the children came within the purview of MCL 712A.2(b). The jury was required to find that the minor children came under that statutory subsection by a preponderance of the evidence. MCR 5.972(C)(1), now MCR 3.972(C)(1); *People v Snyder*, 223 Mich App 85, 88; 566 NW2d 18 (1997). Evidence was presented that respondent left her children for long periods of time in the care of others without disclosing her whereabouts, used marijuana, had been diagnosed with mental illness and did not take prescribed medication, and was the victim of severe domestic violence. Jurisdiction was established by a preponderance of the evidence, and the trial court properly entered the order assuming jurisdiction over the minor children.

Affirmed.

/s/ Pat M. Donofrio
/s/ Richard A. Bandstra
/s/ Peter D. O’Connell